IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1757

MARY WHITNEY RENZ, etc., *et al.*,
Petitioners,

against

LYMAN A. BEEMAN and MARY H. BEEMAN, etc., *et al.*,
Respondents.

BRIEF OF RESPONDENTS LYMAN A. BEEMAN AND MARY H. BEEMAN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Issue Presented

Was the Court of Appeals correct in affirming the ruling of the trial court that the causes of action asserted by the petitioners, plaintiffs below, were barred by the applicable New York statute of limitations?

Respondents submit that the Court of Appeals ruled correctly on this issue, and that the claims asserted in this action were clearly time-barred.

Statement of Facts

This case is the culmination of a long and frequently bitter family dispute in which petitioners have sought to upset the provisions for control of Finch Pruyn & Co., Inc. ("Finch Pruyn") made by their predecessors in interest. Petitioner Mary Renz is a beneficiary of trusts composed solely of voting shares of Finch Pruyn. Respondents are the trustees of those trusts, which hold a majority of Finch Pruyn's voting stock. The history of Finch Pruyn, of the relations among the various members of the Pruyn family, of the creation of the trusts of which petitioner Mary Renz is a beneficiary and the Beemans are trustees and of the transaction which forms the centerpiece of the petitioners' claims is dealt with exhaustively in the opinions of the District Court (A. 47-66)* and the Court of Appeals (A. 13-23), and need not be repeated. However, several observations as to the nature of the breach of duty laid to the Beemans and the findings of the Courts below will aid an understanding of the issue presently under consideration.

Briefly, the petitioners' claims focus on the purchase by Mrs. Beeman of 2,000 shares of preferred stock of Finch Pruyn from the Metropolitan Museum of Art. Those shares were bequeathed to the Museum in 1958 by Mrs. Helen Finch Foulds,** and represented 25% of the voting shares of Finch Pruyn.

Negotiations for the purchase of the Museum's stock went on for a period of 3½ years. Mr. Beeman testified

* Citations noted "A." followed by a page number refer to the Appendix annexed to the Petition.

** Mrs. Foulds' bequest to the Metropolitan Museum also included some 6,300 shares of non-voting common stock. Those shares were purchased in August, 1962 by Finch Pruyn.

without objection at trial that during this period of time, extensive discussions were held regarding the purchase of the shares in both Company and family circles, and the District Court so found (A. 68). Mr. Beeman further stated, again without objection, that he had been delegated by family members to conduct those negotiations, and that he acted "for them and after discussions within the management of the Company, and with the sisters, particlarly Mrs. Hyde," through whom petitioners acquired a portion of their interest in the trusts, and whose consent under New York law would have bound the plaintiffs. *Central Hanover Bank & Trust Company* v. *Russell*, 290 N.Y. 593, 48 N.E.2d 704 (1943); *Matter of Cowles*, 22 App. Div. 2d 365, 255 N.Y.S.2d 160 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 567 (1966); Restatement (2nd) Trusts, §216, Notes h and i. He also offered to prove that he had specifically discussed the proposed transaction with the sisters and had obtained their approval, but this proposed testimony was excluded by the District Court in obedience to the command of the New York State Dead Man's Statute (A. 68). (If admitted and believed, that testimony would have constituted a complete defense under New York law.) The District Court did find generally, however, that Mr. Beeman's dealings with his beneficiaries were marked by "courteousness and responsiveness, especially to inquiries concerning the trust." (A. 69).

Petitioners allege that in purchasing these shares for her personal account, Mrs. Beeman violated her duties to the trusts, even though the Museum stock was not then, and never had been, a trust asset.

The District Court (Judge Foley) held that the Beemans had violated no duty to the petitioners. It found as a fact that the Beemans acted both in good faith and in the

best interest of the trusts and of Finch Pruyn in the purchase of the Museum stock (A. 67). In dealing with the statute of limitations the District Court found no support for petitioners' allegations of fraud, and therefore no basis to toll the statute of limitations by applying the doctrine of equitable estoppel (A. 76).

Although admitting that authority was "sparse" (A. 35), a majority of the Court of Appeals held that the Beemans' purchase of the Museum shares violated their fiduciary duties.* It did not, however, upset the finding of the District Court that the Beemans had acted honestly and in good faith (A. 35-36). Indeed, petitioners adduced at trial *not one single shred* of evidence upon which a contrary finding could *possibly* be based. To say, then, as the petitioners do at page 12 of their petition that the Court of Appeals' decision is filled with "conjecture and speculation that they [Beemans] acted without being conscious of the breach" distorts the record and ignores the petitioners' burden to prove the elements of the causes of action they assert. By this petition, they seek this Court's aid in relieving them of their burden so that they may proceed with their effort to penalize trustees who have at all times acted honestly, in good faith and in the best interests of the trusts and the Company which provide petitioners with financial security.

* Indeed, we submit that in finding a breach of duty in these circumstances, the Second Circuit adopted a distinctly minority view. *Compare Wootten* v. *Wootten*, 151 F.2d 147 (10th Cir. 1945), 159 F.2d 567 (10th Cir. 1947), upon which principal reliance was placed, with *Donnelly* v. *Consolidated Investment Trust*, 99 F.2d 185 (1st Cir. 1938); *In re Johnson's Estate*, 187 Wash. 552, 60 P.2d 271 (1936); *Houghteling* v. *Stockbridge*, 136 Mich. 544, 99 N.W. 759 (1904); *see also Mannheimer* v. *Keehn*, 30 Misc. 2d 584, 41 N.Y.S. 2d 542 (Sup. Ct. Monroe County 1943), *modified on other grounds*, 268 App. Div. 813, 49 N.Y.S.2d 304 (4th Dep't 1944), *amended on other grounds*, 268 App. Div. 845, 51 N.Y.S.2d 750 (4th Dep't 1944).

ARGUMENT

Petitioners' Claims Are Barred by the Statute of Limitations

The purchase of the Museum shares was consummated in August, 1962. Both the District Court and the Court of Appeals held that a ten-year statute of limitations was applicable to claims arising from this transaction. Thus, unless it were tolled, the statute would have run in August, 1972. Based upon their findings that the Beemans acted honestly and in good faith, and made no attempt to conceal the transaction, but rather gave sufficient notification to petitioner Mary Renz's mother and predecessor in interest Mrs. Whitney, both courts concluded that there was no basis for tolling the limitations period. Therefore, they held petitioners' action, commonced in September 1974, to be time-barred. This conclusion was correct in every respect.

a. The Applicable Statute of Limitations

New York has an omnibus statute of limitations applicable to equitable actions, including those arising from fiduciary obligations owed by trustees. *Petnel* v. *American Telephone & Telegraph*, 280 App. Div. 706, 117 N.Y.S.2d 294 (3d Dep't 1952). Until September 1, 1963, when the Civil Practice Law and Rules ("CPLR") became effective, the period in that statute was ten years. *See* Section 53 of the former New York Civil Practice Act ("CPA"). It has been held that an equitable cause of action arising before the CPLR became effective, even though it is not sued upon until after the CPLR became effective, is not

barred until the former ten-year period has run. *Beresovski* v. *Warszawski*, 28 N.Y.2d 419, 271 N.E.2d 520, 322 N.Y.S.2d 673 (1971). If, however, the equitable causes of action arose after September 1, 1963, the new period of six years applies. *See* CPLR §213(1). Petitioners' claim here relates to the purchase of the Museum shares, which was completed in August, 1962. That is when their cause of action accrued. The instant action, however, was not commenced until September 27, 1974. Thus, unless petitioners can show some basis for tolling the statute, it is clear that their claims are time-barred.

b. Something More Than Breach of Duty Must Be Shown to Toll the Statute of Limitations

Petitioners argue that the Court of Appeals was in error in its holding that in the absence of fraudulent intent, a cause of action for breach of fiduciary duty becomes time-barred ten years from the last act of breach. However, *Erbe* v. *Lincoln Rochester Trust Co.*, 2 App. Div. 2d 242, 154 N.Y.S.2d 179 (4th Dep't 1956), *rev'd on other grounds*, 3 N.Y.2d 321, 144 N.E.2d 78, 165 N.Y.S.2d 107 (1957), 13 App. Div. 2d 211, 214 N.Y.S.2d 849 (4th Dep't 1961), 14 App. Div. 2d 509, 217 N.Y.S.2d 592 (4th Dep't 1961), *appeals dismissed*, 11 N.Y.2d 754 (1962), upon which plaintiffs rely, clearly shows that the Court of Appeals was correct. In *Erbe*, beneficiaries of an estate of which the defendant Trust Company was executor complained that that defendant had breached its duties by purchasing estate property at a judicial sale. The Appellate Division held that the complaint stated a cause of action, not for actual fraud, but for breach of fiduciary duty, which is a constructive fraud under New York law:

> "'The appellants are not bound to show, in order to become entitled to the relief they asked, that [the sale] was iniquitously conceived and executed. If the findings established that the trustees, in making the transfer to [the co-executor], acted in contravention of principles which the law charged them to observe, and to the injury of the appellants, they were guilty of constructive fraud, as a necessary consequence, regardless of their motive or intention. Constructive fraud, although a breach of duty, may be consistent with innocence. The purpose to defraud need not enter into it because the law regards the act which gives it rise as fraudulent *per se*. Of such class of acts is the dealing by trustees for their own benefit in matters to which their trust relates.' *Costello* v. *Costello*, 209 N.Y. 252, 258-259. . . ." *Erbe* v. *Lincoln Rochester Trust Co.*, *supra*, 2 App. Div. 2d at 245, 154 N.Y.S.2d at 182-83.

The court held that actions for *constructive* fraud, as opposed to actions for *actual* fraud, are barred if not brought within 10 years of their accrual:

> "Nevertheless, we are of the opinion that the action is barred by the 10-year period of limitation (Civ. Prac. Act §53 [the predecessor to CPLR §213(1)]), *which runs from the time of the wrong, not from the time of discovery.* (*Pitcher* v. *Sutton*, 238 App. Div. 291, aff'd. 264 N.Y. 638)." 2 App. Div. 2d at 244, 154 N.Y.S.2d at 182. (Emphasis added.)

To the same effect are *Buttles* v. *Smith*, 281 N.Y. 226, 236, 22 N.E.2d 350, 353 (1939); *Spollholz* v. *Sheldon*, 216 N.Y. 205, 110 N.E. 431 (1915); *Lammer* v. *Stottard*, 103 N.Y. 672, 9 N.E. 328 (1886); *Smith* v. *Hamilton*, 43 App. Div. 17, 59 N.Y.S. 521 (4th Dep't 1899) and *Yeoman* v. *Townshend*, 74 Hun 625, 26 N.Y.S. 606 (1st Dep't 1893).

In reversing the Appellate Division, the New York Court of Appeals did not disagree that causes of action for constructive fraud are subject to a ten-year limitation period. Indeed, by implication, they agreed with that portion of the lower court opinion. Rather, the Court of Appeals found that there were sufficient allegations of actual fraud to take the complaint out of Civ. Prac. Act §53:

> "As we read the complaint we find that despite the allegations of fiduciary relationship and the breach thereof, there are other allegations which, expressly and by fair and reasonable intendment, are sufficient to make the action one to procure judgment on the ground of fraud within the contemplation of subdivision 5 of section 48 of the Civil Practice Act. . . ." *Erbe* v. *Lincoln Rochester Trust Co., supra*, 3 N.Y.2d at 325, 144 N.E.2d at 80, 165 N.Y.S.2d at 110.

After additional pretrial discovery, plaintiffs in *Erbe* served a supplemental complaint. Defendants' motion to dismiss on limitations grounds was granted by the lower court, but reversed by the Appellate Division, which found plaintiffs' allegations of misrepresentation and concealment sufficient to prevent a dismissal on pleadings. 13 App. Div. 2d at 213, 214 N.Y.S.2d at 852. Significantly, the Appellate Division let the limitations defense remain in the answer, noting that plaintiffs should be permitted to litigate the issue of estoppel by proving the intentionally fraudulent conduct they alleged.

Since there was a complete failure of proof at trial that the Beemans acted with the intent to defraud, deceive, mislead or conceal (and, indeed, it appeared rather clearly that they were acting in good faith at all times), it is clear under New York law that the time within which petitioners could commence this action expired in August, 1972. Petitioners' claims are thus time-barred.

c. Respondents' Disclosure Was Sufficient to Prevent Tolling of the Statute of Limitations

In a further effort to circumvent the operation of the statute of limitations, petitioners next assert that Mrs. Beeman's purchase of the Museum shares was intentionally and fraudulently concealed from them until 1972. They assert that respondents should therefore be equitably estopped from relying upon the statute of limitations.

The answer of the Court of Appeals to this argument was both clear and correct:

> "Equitable estoppel is not available to toll the statute of limitation in all cases of fiduciary breach, even if there was a breach of an initial duty to disclose. *See Scheuer* v. *Scheuer*, 308 N.Y. 447, 126 N.E.2d 555 (1955). It is invoked, rather, when the defendant's affirmative misconduct, *after* his initial breach of duty, 'produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.' *General Stencils, Inc.* v. *Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337, 340, 219 N.E.2d 169, 171 (1966)." (A. 36).

In *Scheuer* v. *Scheuer*, 308 N.Y. 447, 126 N.E.2d 555 (1955), the plaintiff wife claimed that she had loaned money to her husband to purchase real property to be held in both their names. The husband, however, took title to the property in his name only. Plaintiff alleged that her husband promised to have title to the property placed in her name as well on four different occasions, but finally, some twelve years after the purchase, flatly refused to do so. The wife's suit to impress a constructive trust in her favor on the real property involved was dismissed on both statute of frauds and statute of limitations grounds. Plaintiff urged

that the defendant should be equitably estopped from reliance on the statute of limitations because of the confidential relationship of the parties and the husband's alleged false representations concerning transfer of title. These arguments were rejected by Judge (later Chief Judge) Fuld:

> "Nor is there any basis for estoppel in the asserted confidential relationship of the parties. The statute of limitations is not tolled merely because the parties are husband and wife. (See *Dunning* v. *Dunning*, 300 N.Y. 341, 343.) It is urged that we may here draw an analogy from the settled doctrine of equity that the statute of frauds may not be raised as a bar to the granting of relief, by way of constructive trust, against unjust enrichment accomplished by abusing a confidential relation. (Cf. *Wood* v. *Rabe*, 96 N.Y. 414; *Goldsmith* v. *Goldsmith*, 145 N.Y. 313; *Sinclair* v. *Purdy*, 235 N.Y. 245.) However, the suggested extension of that doctrine to a case involving the statute of limitations is without support, either in authority, in logic or in policy.
>
> The statute of frauds, it is quite true, will not be allowed to serve as 'an instrument of fraud' in depriving the wronged party of all remedy whatever in such cases, particularly where that statute comes in conflict with the traditional powers of equity in the field of constructive trust. (See *Wood* v. *Rabe*, *supra*, 96 N.Y. 414, 425; *see*, also, *Latham* v. *Father Devine*, 299 N.Y. 22, 27-29.) Such considerations as those, however, have no application to the issue here presented. There is no evidence that defendant was using the statute of limitations as 'an instrument of fraud,' and invocation of the defense of that statute furnishes no interference with the exercise of equitable jurisdiction, it being well settled that even causes of action in equity are subject to time limitations. (See, e.g., *Sialkot Importing Corp.* v. *Berlin*, 295 N.Y. 482, 486-487; *Mills* v. *Mills*, 115 N.Y. 80, 86.) Plaintiff had 10 years within which to pursue her remedy against defendant, and there is no warrant or justification for creating any exception to the usual limitations applicable in such cases." 308 N.Y. at 452-53, 126 N.E.2d at 558.

Here there is no evidence that the respondents were using the statute of limitations as an instrument of fraud—indeed, there is no proof whatever of fraud in this action. Nor is there any evidence that the Beemans concealed the purchase of the Museum shares. The proof, in fact, was precisely to the opposite. On September 10, 1963 Mr. Beeman wrote a letter (A. 78-79) to petitioner Mary Renz's mother, Mrs. Whitney, outlining to her the extent of Mrs. Beeman's personal holdings of Finch Pruyn stock, and that of the trust. That letter offered to answer any questions Mrs. Whitney might have. Further, in 1969 petitioner Franklin Renz, acting as Mrs. Whitney's representative, met with Mr. Elmer White, then Vice-President and Treasurer of Finch Pruyn, to make inquiries concerning the status of family stock holdings. All of Franklin Renz's questions were answered fully and completely. Indeed, he was given a breakdown of holdings by shareholder name and the number of shares held by each.

As the Court of Appeals observed, this information must be viewed in light of what the petitioners and their predecessor in interest, Mrs. Whitney, already knew. Since Mrs. Whitney knew the content of the various family trusts and could, by arithmetic calculation, have determined the number of shares Mrs. Beeman received by inheritance, she, and petitioners, could easily have found that Mrs. Beeman had acquired a significant number of shares by some other means. That the inquiry was pressed no

further, especially in view of Mrs. Whitney's, and petitioners', undeniable hostility and suspicion toward the Beemans, shows a wilful act on the part of the petitioners to remain ignorant.

In the recent case of *Trepuk* v. *Frank*, 58 App. Div. 2d 556, 557, 396 N.Y.S.2d 18, 19 (1st Dep't 1977) the court commented upon the duty of an estate beneficiary to make reasonable inquiry:

> "'[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him. He will be held, for the purposes of the Statute of Limitations, to have actually known what he might have known and ought to have known.' (*Higgins* v. *Crouse*, 147 N.Y. 411, 416)."

Similarly, petitioners here had sufficient information to put them to a duty of further inquiry.

One further point should be made on the issue of disclosure. In their petition, the Renzes comment upon Mr. Beeman's letter to Mrs. Whitney, implying (although not forthrightly claiming) that it should have been excluded by the trial court on the basis of New York's Dead Man's Statute, CPLR §4519.* In fact, the trial court's search for

* We note that Mr. Beeman's letter does not run afoul of CPLR §4519. *Yager Pontiac, Inc.* v. *Fred A. Danker & Sons, Inc.*, 41 App. Div. 2d 366, 368, 343 N.Y.S.2d 209, 211 (3d Dep't 1973), *aff'd*, 34 N.Y.2d 707 (1974). Any further objections petitioners may have had to the admissibility of Mr. Beeman's letter were not presented to the trial court or to the Court of Appeals, and have clearly been waived. *Trade Development Bank* v. *Continental Insurance Company*, 469 F.2d 35 (2d Cir. 1972).

the truth was significantly hampered by petitioners' assertion of the Dead Man's rule with respect to Mr. Beeman's conversations from 1958 to 1962 with the then-living trust beneficiaries, Mrs. Hyde and Mrs. Cunningham, regarding purchase of the Museum stock. That petitioners should now so loudly complain that there was a lack of disclosure to the trust beneficiaries is both ironic in view of their trial tactics and instructive as to their motivations in bringing this action, and burdening this Court with the instant petition. As we noted at the outset, this petition is the culmination of a long and frequently bitter family dispute. The Court of Appeals, applying New York law, has, we submit, correctly disposed of the issues presented on this petition. The dispute should now be put to rest.

Conclusion

This case involves no federal question. To the extent it involves the trust law of New York, it was decided by the Court of Appeals in accordance with petitioners' contentions. As to the statute of limitations, it is clear in New York that where a trustee acts in good faith, the statute of limitations commences to run from the breach, whereas where a trustee acts in bad faith, the statute may be tolled. Both courts below clearly found that under the facts of this case the statute ran from the breach, and accordingly the action is barred. There is nothing in this purely factual determination warranting review by this Court. There-

fore, this petition for a writ of certiorari should, in all respects, be denied.

Respectfully submitted,

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